IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1603

KENIL K. GOSS, Plaintiff-Appellant-
Petitioner Pro Se

v.

REVLON, INC. and its wholly owned subsidiary, USV PHARMACEUTICAL CORPORATION,
Defendants-Appellees-Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT - NEW YORK

INTRODUCTION

1. The petitioner, Kenil K. Goss ("G") prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit ("CA2") rendered on November 16, 1978, together with its denial of rehearing thereof rendered on January 22, 1979.

The judgment affirmed the summary dismissal of the suit without any trial or oral argument on its merits by Honorable Judge Marvin E. Frankel of United States District Court for Southern District of New York ("SDNY") on May 19, 1978.

OPINIONS BELOW

2.1. The CA2's judgment (on the prior suit) entered on October 29, 1976, reported in 548 F.2d 405 (CA2, 1976) is in Appendix A.

2. The CA2's unreported judgment on the present suit entered on November 16, 1978 is in Appendix B.

3. The CA2's unreported denial of rehearing entered on January 22, 1979 is in Appendix C.

4. The CA2's unreported denial of "a suggestion that the action be reheard en banc" entered on January 22, 1979 is in Appendix D.

5. The SDNY's unreported MEMORANDUM opinion entered on May 19, 1978 is in Appendix E.

JURISDICTION

3.1. This is an employment discrimination suit under 42 U.S.C. § 1981 ("1981"), based on the same facts and issues of earlier timely: (i) suit under 42 U.S.C. § 2000e ("Title VII"), and (ii) repeated prayers to amend original complaint under Rule 15(a) of Federal Rules of Civil Procedure ("FRCP") to assert 1981 claim.

2. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

4. Does the filing, within the period prescribed by the applicable state statute of limitations, of a: (a) Title VII suit, or (b) motion to amend original complaint to assert 1981 claim, toll the statutory period for a subsequent 1981 suit, based on the same original facts and issues of the prior Title VII suit?

FEDERAL AND STATE LAWS

5. U. S. Constitution: Art. I, Sec. 10. 42 U.S.C. § 1981. FRCP: 1, 3, 4, 15, 42. NYS: CPLR §§ 104, 203, 214; HRL §§ 297.9, 300.

STATEMENT OF THE CASE

6. This is an employment discrimination suit under 1981 filed by G for himself and his class members against the respondents ("R") on December 12, 1977 at the SDNY, based on the same facts and issues of his original Title VII suit filed on October 25, 1973 and refiled on December 12, 1973.

7. G was employed by R for five years from April 14, 1967 to March 31, 1972. R served "you are fired" oral dismissal notice upon G on March 7, 1972, but agreed to its effective date as at March 31, 1972, which it confirmed in writing subsequently. Within 10 days G became seriously ill and remained so for the rest of 1972.

8. At the earliest opportunity to do so, G filed his charge of discrimination with Equal Employment Opportunity Commission ("EEOC") on March 20, 1973. EEOC mailed a copy of it to New York State Division of Human Rights ("NYSDHR") on the same day. NYSDHR has recognized it as valid and timely under New York State Human Rights Law ("NYSHRL") § 297.5.

9. EEOC determined the charge to be untimely and issued Notice of Right to Sue on October 17, 1973. Based thereon, G filed his Title VII suit on October 25, 1973 at the SDNY, on EEOC's standard complaint form. The form contained no provision for stating 1981 claim and G, not being a lawyer, was then totally unaware of his 1981 right.

10. NYSDHR considered G's charge on October 30, 1973. Since, however, G's suit had already been filed (in order to meet Title VII's filing requirement within 90 days of the issuance of Right to Sue Notice), NYSDHR had no alternative but to suspend its jurisdiction, as required by NYSHRL § 297.9.

11. The suit was refiled on December 12, 1973 at the SDNY. The two summonses were delivered to U. S. Marshals Service on the same day and were served upon Revlon, Inc. on December 18, 1973 and upon USV Pharmaceutical Corporation on January 10, 1974.

12. Pretrial hearings in chamber were held by Honorable Judge Richard Owen on January 31, 1974 and on March 29, 1974. Few days before the March 29, 1974 hear-

ing, while preparing for it in a library, G became aware of his 1981 right. Not knowing how to assert it, G asked Judge's clerk on April 4, 1974. It was only on June 6, 1974, however, G was able to obtain the information from Judge's another clerk. Accordingly, G filed his motion on August 8, 1974, praying, inter alia:

> "Allowing the plaintiff to bring the jurisdiction of .... 42 U.S.C. 1981 .. ... in his proposed amended complaint (in lieu of filing a separate suit against the same defendants ....) so as to enable him to obtain a more equitable relief, in addition to relief under the Civil Rights Act of 1964, as amended."

Because of Judge's continued silence, G filed two further motions on August 30, 1974 and on September 16, 1974 praying for the same. Although a pretrial conference was held on September 27, 1974 for the sole purpose of hearing G's motions, he did not do so, then or ever.

13. After R's protracted discovery motion practice, Judge granted summary dismissal of G's suit on November 7, 1975. He also promptly denied G's motion for a new trial or reargument on December 31, 1975, but said nothing on G's 1981 claim, which was also restated therein.

14. G's first appeal to CA2 was heard on October 7, 1976 and decided on October 29, 1976, reported in 548 F.2d 405 (CA2, 1976), holding, inter alia, that:

> "Since the original complaint was filed within the applicable three-year statute of limitations, Thomas Kaiser v. Cahn, 510 F.2d 282, 284 (2d Cir. 1974), the § 1981 claim would itself be timely." (Appendix A, p.A-4).

15. CA2 also held that:

> "Plaintiff had sought leave to amend to add cause of action, among others, under Civil Rights Act of 1866, 42 U.S. C. § 1981; the district court improperly failed to rule on that motion." (Appendix A, p.A-2)

(referring to G's motion of August 8, 1974) and remanded the case. This time, however, Judge lost no time (and without even waiting for the issuance of CA2's "Mandate" under Rule 41(a) of Federal Rules of Appellate Procedure ("FRAP")) in denying G's prayer of August 8, 1974 on November 16, 1976 and "sub silentio nunc pro tunc" after 826 days.

16. Anticipating Judge's aforesaid denial, G was then considering for a Petition for Writ of Certiorari to this Court, as provided by Rule 41(b) of FRAP. Judge's

peremptory action foreclosed G's right to present his case to this Court then and forced G to go through his fruitless second appeal, which CA2 heard on April 25, 1977 and decided on April 29, 1977 (unreported), holding, inter alia, that:

> "we find no abuse of discretion in the district court's denial of leave to amend."

17. G then filed a Petition for Writ of Certiorari to this Court (77-535) on July 13, 1977, but was denied on November 28, 1977.

18. G then filed his present suit on December 12, 1977, based on the same facts and issues as originally presented on October 25, 1973 (not even a comma has been added thereto) but related solely to his 1981 claim, relying on CA2's holding (para.14, p.7 ante) and on well-known tolling principle. SDNY, without any trial (or even any oral hearing, in spite of G's prayer), granted summary dismissal of G's suit on May 19, 1978, holding, inter alia, that:

> "This court confronts a wholly new action, instituted long after the prescribed period had expired." (Appendix E, p.A-11).

19. CA2 heard the appeal on November 16, 1978 and affirmed the SDNY on the same day without any opinion (Appendix B) and denied G's petition for a rehearing on January 22, 1979 (Appendix C). CA2 also denied on the same day G's suggestion for a rehearing en banc (Appendix D).

REASONS FOR GRANTING THE WRIT

20. "there are special and important reasons": why the Writ should be granted, as required by Rule 19.1. of Rules of the Supreme Court ("RSC"). First, this case presents an important question of Federal law - namely, the right of a "private attorney general" in securing enforcement of a Federal civil rights law through Federal courts. Secondly, more specifically, the case meets with the several criteria laid down by Rule 19.1.(b) of RSC.

21. "the minimal steps necessary to preserve each claim independently." Taken In The Present Case At Bar: Although there is no reported case so far that fits with the case, it does, however, meet with the three tests applied by this Court in Johnson v. Railway Express Agency, Inc., 421

U.S. 454, 466-467 (1975), in deciding upon the question of Johnson's untimeliness of his 1981 claim. Unlike Johnson, in the present case, however, G had taken:

> "the minimal steps necessary to preserve each claim independently." (p.466),

by: (a) commencing his adversarial proceedings under Title VII as early as on October 25, 1973; and (b) filing a motion as early as on August 8, 1974 for a leave to amend original complaint so as to include 1981 claim. Both the dates were before the expiry of the 3-year period prescribed by New York State Civil Practice Law and Rules ("CPLR") § 214.2. Thus, unlike Johnson, G did not rest content with his administrative proceedings before EEOC and NYSDHR, but served a timely adversarial notice upon R in respect of his 1981 claim, while his Title VII suit was still going on.

22. "there is complete identity of the causes of action": The second test applied to Johnson was that his cause of action under Title VII was not:

> "exactly the same cause of action subsequently asserted." (p.467).

This is not the case here, inasmuch as

both of G's causes of action under Title VII and under 1981 are "exactly the same" - namely, unlawful employment discrimination practices by R against G and members of his class and prohibited by Federal laws. Even G's amended complaint filed on September 22, 1975 was a mere repetition of his prayer of August 8, 1974, so far as his 1981 claim is concerned. As the amended complaint was denied by Judge Owen "sub silentio nunc pro tunc" on November 16, 1976 (after 826 days), footnote 1 to CA2's first judgment (Appendix A, p. A-3) no longer applies. Accordingly, G stands on the cause of action stated in his original complaint of October 25, 1973 (refiled on December 12, 1973) and in his prayer of August 8, 1974 (para.12, p.6 ante), as the basis for the present suit. This fact has been made clear in G's complaint on the present suit. For that reason, he has not filed any paper, describing what the cause of action is on the present suit, but has only referred to his original complaint of 1973 and to his prayer of 1974 regarding his 1981 claim. Even R does not dispute that this is "exactly the same cause of action", but dispute only its timeliness. This

Court itself has recognized this test as by far the most important of all:

> "Finally, and perhaps most importantly, the tolling effect given to the timely prior filings in American Pipe and in Burnett depended heavily on the fact that those filings involved exactly the same cause of action subsequently asserted. This factor was more than a mere abstract or theoretical consideration because prior filing in each case necessarily operated to avoid the evil against which the statute of limitations was designed to protect.[14]" p.467; footnote 14 omitted).

23. The finding that: "Thus, in a very real sense, petitioner has slept on his § 1981 rights." (p.466) Does Not Apply To The Present Case At Bar: This is the third test which this Court applied to Johnson in determining untimeliness of his § 1981 claim. The fact that G tried repeatedly, within the statutory period, to assert his 1981 claim speaks for itself.

24. G Asserted Class Claim Ab Initio: Another test (not relevant to Johnson), which this Court applied in American Pipe & Construction Co. et al. v. Utah et al., 414 U.S. 538 (1974), is that:

> "We are convinced that the rule most consistent with federal class action

procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.[24] " (p.554; footnote 24 omitted).

In the present case at bar, its class nature is plain in the original complaint.

25. G's Good Faith Reliance On Efforts To Assert 1981 Claim While Title VII Suit Was Still Going On: In holding the present suit as "a wholly new action, ..." (para.18, p.8 ante), SDNY implied that it should have been filed within the statutory period (while Title VII suit was still going on), in keeping with the letter of the law, as established by this Court in Johnson. But, then, it would not have been in keeping with the spirit of the law, especially FRCP. First, the filing of two different suits for the same facts and issues would have defeated the spirit of Rule 1:

"They shall be construed to secure the just, speedy, and inexpensive determination of every action."

Secondly, it would make Rule 15(a) meaningless, since, obviously, it is designed to avoid multiple suits by providing:

"Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

Thirdly, even if a separate 1981 suit within the statutory period were filed, it would not have served any one better (least of all, the defendants), since Rule 42 requires consolidation of:

"actions involving a common question of law or fact".

Fourthly, two separate suits for the same cause of action would only have complicated the matter for an inexperienced judge then just appointed to the bench and have added to the case load of the country's busiest Federal District Court.

Fifthly, as a practical matter, even if a timely separate 1981 suit were filed, G would have referred to the same original facts and issues as presented in his earlier Title VII suit, just as he has done in respect of his present suit. Thus, R would not have obtained any more adversarial information as to the nature of G's 1981 claim than it has had after receiving G's prayer for a leave to assert his 1981 claim on August 9, 1974.

On this point, this Court has held in American Pipe (para.24, p.12 ante) that:

> "Within the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation, whether the actual trial is conducted in the form of a class action, as a joint suit, or as a principal suit with additional intervenors.[25]" (p.555, footnote 25 omitted).

Sixthly, as a matter of fact, G initially thought (after learning of the existence of his 1981 rights in the last week of March 1974) that it would be necessary to file a separate suit to assert it. However, on June 6, 1974 Judge's law clerk informed G that it would not be necessary and suggested instead to file a motion, praying a leave to amend his original pleading to assert his 1981 claim. This was precisely what G had done. Since then G pursued the matter in good faith upto this Court. After receiving the denial of Certiorari, G has taken only five working days to file the present suit. Thus, G is in the same position as Burnett was, viz.:

> "Laches, of course, has no application in the instant case, as petitioner filed in the federal court only eight days after his state court action had

> been dismissed." (per concurrent judgment of Mr. Justice Douglas, joined by Mr. Justice Black; p.437).

Seventhly, G was denied an opportunity to file his present suit within the statutory period by Judge's silence for 826 days to rule on G's motion of August 8, 1974. Judge was supposed to have ruled on it on September 27, 1974. Had he denied it at that time, then G could have filed his present suit then and there free of all controversies. Instead, Judge denied it only in his own mind. Even Chief Judge Kaufman (with over 30 years on the bench) had to admit during the first appeal hearing on October 7, 1976 that:

> "we don't know what was in the judge's mind."

If it was so very difficult even for one of America's most distinguished jurists to fathom into the Judge's mind, how was it then possible for a layman plaintiff (unassisted by any legal counsel) to know (within the statutory period) what was indeed "in the judge's mind."?

Eighthly, Even so G did not stop there. He tried his best to find out what was indeed "in the judge's mind." by filing

several reminding motions. At that stage, Judge's law clerk told G that there was no need for any further motion, as the one of August 8, 1974 was sufficient, which would be heard as soon as R's discovery process was over. The discovery, however, went on upto November 14, 1975 (one week after the summary dismissal).

Ninthly, on November 1, 1974 R's attorney told G that "there would be no need" for G to submit his then proposed rewritten complaint (which G did submit on September 22, 1975, for other reasons). Even Judge's law clerk told G that there was no need to submit a fresh (rewritten) complaint in support of his prayer for a leave to amend his original complaint. Indeed, Rule 15(a) does not require it. Thus, CA2's characterization of G's "extended and undue delay," (Appendix A, p. A-5) in submitting the rewritten complaint has no relevance to G's assertion of his 1981 claim on August 8, 1974.

Tenthly, there is also a legal question as to whether or not a plaintiff can file a separate suit for the same cause of action, while the matter is already sub judice, as here.

26. Retroactive Application Of Johnson Ruling Is Unconstitutional, Unjust And Illogical: In the present case, SDNY has applied Johnson retroactively, following CA2's and CA5's rulings (Appendix E, p. A-12). Such an application is simply unconstitutional, because of the absolute prohibition against "ex post facto Law," under Article I, Section 10 of the U. S. Constitution. It is also unjust, because this Court has never made any pronouncement thereon, either in Johnson or in any other case since. Perhaps for that reason, there is a conflict of opinion on this question among the various Federal Appeals Courts. It is also illogical, because G could not have anticipated the adverse Johnson ruling, contrary to the then prevailing view among all the Federal Circuit Courts. Moreover, by the time Johnson decision was published on May 19, 1975, the statutory period for filing a separate de novo 1981 suit had expired. Even after the Johnson ruling, SDNY held against its retroactive application to Crouch v. United Press International, 74 Civ. 296 (August 20, 1975) (reported in CCH's 10 EPD ¶10,393, p.5706, footnote). Similarly, CA2 held against its retroac-

tive application to (in its rehearing decision in) DeMatteis v. Eastman Kodak Co., 520 F.2d 409 (July 30, 1975), citing the famous aphorism of the late Mr. Justice Frankfurter in Griffin v. Illinois, 351 U.S. 12, 26 (1956) that:

> "[w]e should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights.",

and Chevron Oil Co. v. Huson, 404 U.S. 97, 105-109 (1971). Thus, until CA2's decision in Cates v. Trans World Airlines, Inc., 561 F.2d 1064 on August 5, 1977 the law in this Circuit was against the retroactive application of Johnson ruling. But by then G's Petition for a Writ of Certiorari was already before this Court. Not even the most experienced lawyer could have foreseen this adverse development by any stretch of imagination, for the simple reason that:

> "No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.",

as this Court sagaciously observed in Christianburg Garment Co. v. EEOC, 76-1383 (January 23, 1978); 98 S.Ct. 694.

27. Cases Relied Upon Cannot Be Applied: In the 3 cases, (namely: (1) Johnson; (2) Cates; and (3) Williams v. Phil Rich Fan Manufacturing Co., 552 F.2d 596 (CA5, May 18, 1977)), on which SDNY has relied (Appendix E, p.A-12), plaintiffs therein failed to file their respective Title VII suits within the statutory periods of the states concerned. Hence they tried to tack their 1981 claims to their timely non-adversarial proceedings before EEOC. Although SDNY has assumed that the same situation applies to the present case, and has even incorrectly attributed to G's papers (Appendix E, p.A-11), CA2's first judgment (Appendix A, p.A-4), however, clearly shows that his Title VII suit was indeed filed within the statutory period. Now the simple question is, as has already been stated (para.4, p.3), can he tack his present 1981 suit to his timely filed Title VII suit, or alterna-

tively, can he tack his present suit to his timely filed motion seeking a leave to amend his original complaint to state his 1981 claim? It is this simple question to which the lower courts should have addressed themselves, but have failed to do so, in spite of G's best efforts. Although CA2, in effect, said 'yes' in its first judgment (para.14, p.7 ante), in its answer to the above question, but has given no reason as to why its earlier holding is no longer a law. Indeed, CA2, in order to make its earlier holding quite clear, used the phrase "itself" in that quoted sentence, thereby implying that in the event of denial of the amendment a separate 1981 suit would be timely, since, obviously, there are only two ways to do it - namely, (a) amendment of complaint in respect of an existing timely suit, or (b) future suit (after waiting while the prior suit was sub judice) tacking to the prior suit. The latter is precisely the case here.

28. The Question of "Commencement" Of Action: This is yet another substantive question of law, to which the courts below have failed to address themselves. This

Court held in Goldenberg v. Murphy, 108 U.S. 686, 687 (1882) that:

> " An attempt to commence an action is deemed equivalent to the commencement thereof, within the meaning of this title, ..."

That "title" is now CPLR. In the light of the above quoted holding, G is deemed to have commenced his action on October 25, 1973, since Rule 3 of FRCP clearly provides that:

> "Commencement of Action. A civil action is commenced by filing a complaint with the court."

Moreover, Rule 4(a) provides in part that:

> "SUMMONS: ISSUANCE. Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal ...."

According to Moore's Federal Practice:

> "This is sufficient to suspend the operation of state statutes of limitations in the courts of many states." (footnote 14, p.3-84).

Furthermore, CPLR § 203(b)2. requires only the "first publication of the summons against the defendant" to toll the state statute of limitations. Thus, whether we follow CPLR or FRCP, there is no question that G "commenced" his present action on

December 12, 1973, exactly four years earlier. As regards G's repeated good faith efforts to amend his complaint to assert 1981 claim, CPLR § 203(e) merely requires that the original pleading does:

> "give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading."

Thus, G's giving of such "notice" on October 25, 1973 and again on December 12, 1973 was sufficient to toll CPLR § 214.2 in respect of the present suit. See CPLR pp.2-101 - 2-102. In addition, we have already noted (para.10, p.5 ante) that the jurisdiction of NYSDHR remains suspended, while the matter remains sus judice in Federal Courts, by virtue of NYSHRL § 297.9. It also suspends the state court jurisdiction over the same matter, where dual judicial (whether Federal or another state) reliefs are available, as here. It follows, therefore, that it has also suspended CPLR § 214.2. The logic here is that if it suspends the state court jurisdiction it ipso facto suspends the state statute of limitations, since both CPLR § 104 and NYSHRL § 300 require these laws to be "construed liberally".

It is one of the points, which SDNY has characterized as "equally without merit." (Appendix E, p.A-12), even though there is no established precedent thereon. It is, however, well settled that:

> "In applying the state statute, the state construction of the statute will govern. " (Moore pp.3-54 - 3-60; footnote 13 omitted. See also Johnson, p. 464; and Burnett, pp.426, 430 and 436).

29. Equitable Doctrine Of Notice: This Court has applied this doctrine in a number of landmark cases. See Maty v. Grasselli Chemical Co., 303 U.S. 197, 199-200 (1937); Tiller v. Atlantic Coast Line Railroad Co., 323 U.S. 574, 581 (1944); Herb v. Pitcairn, 324 U.S. 117, 132-133 (1944); Burnett, p.430. In the present case, R has had the actual adversarial notice of G's claim under Title VII from December 18, 1973 and under 1981 from August 9, 1974.

30. Lower Courts Have Failed To Construe Liberally: It is well settled that in cases of "procedural ambiguities", these are resolved in favor of the civil rights claimants. In the present case, the lower courts have failed to do so. One such example is on p.23 ante. There are others.

31. Lower Courts Failed To Consider R's Laches: On March 29, 1974 Judge ordered both the parties to submit their respective briefs before the trial date of June 17, 1974. On June 6, 1974 the trial was cancelled due to R's dilatory motion practice and the submission of the briefs was made to be "as soon as possible, but no rush". Whereas G submitted his brief on August 30, 1974, R never submitted it. G was thus seriously prejudiced from knowing as to whether or not it would be necessary to file a separate de novo 1981 suit while the statutory period therefor had not yet expired. CPLR (pp.2-25 - 2-28) opines that such a conduct would toll the state statute of limitations, citing, inter alia, Glus v. Brooklyn Eastern Terminal, 359 U.S. 231 (1959). See also Burnett, p.427, citing also Glus ruling.

32. Lower Courts Failed To Consider Lack Of Prejudice To R By G's Present Suit: In Love v. Pullman Co., 404 U.S. 522 (1972) this Court upheld the principle of lack of prejudice to a defendant in civil rights cases:

> "in which laymen, unassisted by trained lawyers, initiate the process."

CONCLUSION

33. For the foregoing reasons, the lower court decisions should either be summarily reversed or a Writ of Certiorari be granted.

Respectfully submitted,

Kenil K. Goss

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Plaintiff-Appellant-
Petitioner Pro Se

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K. K. GOSS

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A-1

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Defendants-Appellees-Respondents

APPENDIX

K. K. GOSS
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A-2

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 20, 21—September Term, 1976.

(Argued October 7, 1976 Decided October 29, 1976.)

Docket Nos. 76-7015, 76-7065

KENIL K. GOSS,

Plaintiff-Appellant,

v.

REVLON, INC. and Its Wholly Owned Subsidiary, USV PHARMACEUTICAL CORPORATION,

Defendants-Appellees.

Before:

KAUFMAN, *Chief Judge,*
MANSFIELD and MESKILL, *Circuit Judges.*

Appeal from order of the United States District Court for the Southern District of New York, Richard Owen, *Judge,* dismissing appellant's complaint alleging employment discrimination under Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* Plaintiff had sought leave to amend to add cause of action, among others, under Civil Rights Act of 1866, 42 U.S.C. § 1981; the district court improperly failed to rule on that motion. The case is remanded to the district court for a determination on the issue of leave to amend.

Affirmed in part; remanded in part.

KENIL K. Goss, Westchester, New York, *for Appellant Pro Se.*

DAVID GREENE, New York, New York (Martin C. Greene, Aberman & Greene, New York, New York, of counsel), *for Appellees.*

PER CURIAM:

This is a *pro se* action seeking reinstatement and damages for alleged employment discrimination. Appellant Kenil Goss was employed by USV Pharmaceutical Corporation, a wholly owned subsidiary of Revlon, until March 7, 1972, when he was dismissed. He filed charges with the Equal Employment Opportunity Commission ("EEOC") on March 20, 1973, more than six months after the expiration of the 180 day period of limitations provided for by statute. 42 U.S.C. § 2000e-5(e). The claim was thus dismissed as untimely. Disappointed with the administrative process, appellant began an action in the United States District Court for the Southern District of New York in December, 1973, seeking relief under Title VII of The Civil Rights Act of 1964, 42 U.S.C. § 2000, *et seq.* The failure to file timely charges with the EEOC was, of course, a jurisdictional bar to this proceeding as well. *Weise* v. *Syracuse University*, 522 F.2d 397, 411-12 (2d Cir. 1975).

Appellant sought leave to amend his complaint, in accordance with Fed. R. Civ. P. 15(a), on three occasions, the last time on September 18, 1974. On September 22, 1975, without receiving permission from the court, he proceeded to file an amended complaint. In it, he alleged myriad new causes of action, under 42 U.S.C. §§ 1981, 1983, 29 U.S.C. § 621 and the Thirteenth Amendment; in addition, he moved for class action status.[1] The appellees,

1 Since appellant sought to plead new facts as well as new theories of law, the complaint was properly "supplemental" as well as "amended."

citing the jurisdictional bar and claiming that Goss failed to state a cause of action, submitted a cross-motion requesting dismissal of the original complaint, which Judge Owen granted by memo endorsement. Appellant subsequently let loose a barrage of post-trial motions, all of them meritless. Because the record does not indicate that the district court ruled on the motion for leave to amend, we must examine appellant's amended complaint to determine if it properly states a claim for relief. We will discuss only the § 1981 claim inasmuch as we find Goss' other claims in the amended complaint to be without merit.

42 U.S.C. § 1981 provides a related remedy to Title VII for private discrimination in employment. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975). Although parallel to Title VII, and directed in part at the same illegal practices, § 1981 was not preempted by Title VII, but continues in full force and effect. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47-49 (1974). Moreover, the failure of a claimant to properly pursue his administrative remedies before the EEOC and the appropriate state agency, as happened here, does not preclude him from instituting an action under § 1981. *See Macklin* v. *Spector Freight Systems*, 478 F.2d 979, 996-97 (D.C. Cir. 1973). Thus, appellant's failure to meet the jurisdictional requirements of Title VII does not preclude his cause of action under § 1981.

At the outset, we note that inasmuch as the claim under 42 U.S.C. § 1981 arises out of the same "transaction or occurrence" set forth in the original complaint, it would relate back, for purposes of the statute of limitations, under Fed. R. Civ. P. 15(c). Since the original complaint was filed within the applicable three-year statute of limitations, *Thomas Kaiser* v. *Cahn*, 510 F.2d 282, 284 (2d Cir. 1974), the § 1981 claim would itself be timely. Therefore, if the

amended complaint was allowed, it would state a timely § 1981 cause of action.

It may be that Judge Owen in granting the cross-motion to dismiss intended, *sub silentio,* to deny Goss' motion for leave to amend.[2] While Rule 15(a) commands that such leave is to be freely given, denial of leave to amend in this case would not be an abuse of discretion. The appellant, in seeking to add myriad new claims, advances no reason for his extended and undue delay, other than ignorance of the law; such a failure has been held an insufficient basis for leave to amend. *Troxel Mfg. Co.* v. *Schwinn Bicycle Co.,* 489 F.2d 968, 971 (6th Cir. 1973), *cert. denied,* 416 U.S. 939 (1974); J. Moore, 3 Moore's Federal Practice ¶ 15.08[4] at 897-900 (1974). Thus, in *Head* v. *Timken Roller Bearing Co.,* 486 F.2d 870 (6th Cir. 1973), plaintiffs, who had brought a *timely* action under Title VII were denied leave to amend to add a cause of action under 42 U.S.C. § 1981. They sought leave on the grounds that they had become aware of the possibilities of § 1981 only after filing the complaint. The Court of Appeals upheld the denial of leave as an entirely proper exercise of discretion. *Id.* at 874-75.

We remand to the district court for a determination of appellant's motion for leave to amend and, if granted, for further proceedings in accordance with this opinion. As to appellant's other arguments, we affirm the judgment of dismissal.

2 Appellees' moving papers which Judge Owen endorsed asked only that Goss' complaint be dismissed. However, in their memorandum of law in support of the cross-motion, they also conclude that the motion for leave to amend should be denied.

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United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 16th day of November, one thousand nine hundred and seventy-eight.

Present:

HON. STERRY R. WATERMAN

HON. WILLIAM H. TIMBERS

HON. ELLSWORTH A. VAN GRAAFEILAND

Circuit Judges,

KENIL K. GOSS,
Plaintiff-Appellant,

v.

REVLON, INC., and its Wholly Owned Subsidiary, USV PHARMACEUTICAL CORPORATION,
Defendants-Appellees.

Dkt. No. 78-7303

78-7303

Dkt. No. 78-7303

Continued

Appeal from the United States District for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on the opinion of Judge Frankel dated May 19, 1978.

Sterry R. Waterman
STERRY R. WATERMAN

Wm. H. Timbers
WILLIAM H. TIMBERS

Ellsworth A. Van Graafeiland
ELLSWORTH A. VAN GRAAFEILAND

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of January, one thousand nine hundred and seventy-nine

Present:

Hon. Sterry R. Waterman
Hon. William H. Timbers
Hon. Ellsworth Van Graafeiland
Circuit Judges.

KENIL K. GOSS,
Plaintiff-Appellant,
V.
REVLON, INC., and its wholly owned subsidiary, USV PHARMACEUTICAL CORPORATION,
Defendants-Appellees.

Docket No. 78-7303

A petition for a rehearing having been filed herein by the appellant pro-se,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. Daniel Fusaro
A. Daniel Fusaro,
Clerk

UNITED STATES COURT OF APPEALS
FILED
JAN 22 1979
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

78-7303

United States Court of Appeals

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of January, one thousand nine hundred and seventy-nine.

KENIL K. GOSS,

Plaintiff-Appellant,

V.

REVLON, INC., and its wholly owned subsidiary USV PHARMACEUTICAL CORP.,

Defendants-Appellees.

Docket No. 78-1303

78-1303

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by the appellant pro-se, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Irving R. Kaufman

IRVING R. KAUFMAN, Chief Judge

UNITED STATES COURT OF APPEALS FILED JAN 22 1979 A. DANIEL FUSARO, CLERK SECOND CIRCUIT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KENIL K. GOSS, Plaintiff,	:	
-against-	:	77 Civ. 6015
REVLON, INC., et al., Defendants.	:	MEMORANDUM

FRANKEL, D.J.

This pro se action under 42 U.S.C. § 1981 is the most recent effort of Kenil Goss to secure an adjudication on the merits of his claim of employment discrimination by defendants Revlon, Inc., and USV Pharmaceutical Corporation. He can fare no better on this round than he has in the past, for the claim he asserts is time-barred, and defendants' motion for summary judgment of dismissal must therefore be granted.

Although the precise date of plaintiff's termination of employment is apparently disputed, there is no doubt that his dismissal occurred some time in March, 1972. This action was commenced in December, 1977, after plaintiff's prior action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000 (e) et seq., was dismissed as untimely; his later-asserted claims under 42 U.S.C. §1983, the Age Discrimination in Employment Act, and the Thirteenth Amendment were found to be without merit; and his motions for class action status,

and to amend the original complaint to assert a claim under § 1981, were denied. Goss v. Revlon, Inc., et al., 73 Civ. 5826 [sic, correct number is 5286] (Nov. 7, 1975)(memorandum endorsement), aff'd. in part, remanded in part, 548 F.2d 405 (2d Cir. 1976), mem. on remand, 73 Civ. 5826 [sic] (November 16, 1976), aff'd, No. 76-7614 (2d Cir. April 29, 1977), rehearing denied June 7, 1977, cert. denied, 46 U.S.L.W. 3354 (Nov. 28, 1977).

It is undisputed that the limitations period applicable to plaintiff's §1981 claim is the three-year period prescribed in New York CPLR §214(2). Goss v. Revlon, Inc., supra, 548 F.2d at 407; Kaiser v. Cahn, 510 F.2d 282, 284 (2d Cir. 1974). Plaintiff reminds us vigorously and at length that in the first appeal of his prior lawsuit, the Court of Appeals noted that his §1981 claim arises out of the same transaction or occurrence set forth in his original complaint, which was filed within the statutory period. Consequently, had the amendment of the original complaint been allowed, it would have stated a timely claim under §1981. Goss v. Revlon, Inc., supra, 548 F.2d at 407. As already noted, however, plaintiff's motion to amend that complaint under F.R. Civ. P. 15(a) to charge discrimination under § 1981 was denied, and that result has been affirmed. This court confronts a wholly new action, instituted long after the prescribed period had expired.

In his voluminous papers in opposition to the motion for summary judgment, plaintiff contends that the running of the limitations period was tolled by his filing of discrimination charges against the defendants with the appropriate state

and federal administrative agencies. He appears to acknowledge that his contention must founder under the rule of Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), but urges that the holding in Johnson should not be retroactively applied. It is now clear that in the circumstances disclosed, the law is otherwise in this Circuit, Cates v. Trans World Airlines, Inc., 561 F.2d 1064, 1072-74 (2d Cir. 1977), and elsewhere, see, e.g., Williams v. Phil Rich Fan Mfg. Co., 552 F.2d 596 (5th Cir. 1977). Plaintiff's numerous other asserted grounds of opposition are equally without merit.

For the reasons stated, defendants' application for summary judgment should be, and is, granted. The complaint is dismissed.

So ordered.

Dated, New York, New York
May 19, 1978

Marvin E. Frankel
U.S.D.J.